

SCOTT N. SCHOOLS (SCSBN 9990)
 United States Attorney
 JAY R. WEILL (CSBN 75434)
 Assistant United States Attorney
 Chief, Tax Division
 DAVID L. DENIER (CSBN 95024)
 Assistant United States Attorney

9th Floor Federal Building
 450 Golden Gate Avenue, Box 36055
 San Francisco, CA 94102
 Telephone: (415) 436-6888
 Fax: (415) 436-6748

Attorneys for the United States of America

**IN THE UNITED STATES DISTRICT COURT FOR THE
 NORTHERN DISTRICT OF CALIFORNIA
 SAN JOSE DIVISION**

VICKI R. SEIDEL,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

NO. C-07-3141-JF

**UNITED STATES' OPPOSITION
 TO PLAINTIFF'S MOTION FOR
 PRELIMINARY INJUNCTION**

**DATE: JULY 6, 2007
 TIME: 9:00 A.M.**

I. PRELIMINARY STATEMENT

This is an action for injunctive relief brought by plaintiff pursuant to I.R.C. §§ 7421(a) and 7426(b) and Rule 65(b) of the Federal Rules of Civil Procedure. Plaintiff seeks a preliminary injunction ordering the Internal Revenue Service to return \$321.30 allegedly seized from Washington Mutual Bank, account no. 0980711488 on or about May 29, 2007, ordering the Internal Revenue Service to return any monies seized pursuant to a levy of plaintiff's salary and restraining the Internal Revenue Service from further levies on plaintiff's salary.

II. STATEMENT OF FACTS

On October 23, 1996, Thomas E. Seidel, plaintiff's husband, was assessed \$601,251.24 as a trust fund recovery penalty under I.R.C. § 6672 for the tax periods ending September 30, 1996. (Smith Decl. ¶ 3) This penalty was assessed on account of his failure to collect and pay

1 over employment taxes in his capacity as the president of T.E. Seidel Electric, Inc. (Smith Decl.
2 ¶ 3) The balance due on the trust fund recovery penalty assessment against Thomas E. Seidel as
3 of June 28, 2007, was \$1,007,918.53. (Smith Decl. ¶ 5) Plaintiff was married to Thomas E.
4 Seidel at the time the tax debt was incurred and the Seidel's resided within the state of
5 California. (Smith Decl. ¶¶ 4 and 6)

6 On August 24, 2000, the IRS, by certified mail-return receipt, sent Thomas E. Seidel a
7 Final Notice, Notice of Intent To Levy and Notice of Your Right to a Hearing with respect to the
8 trust fund recovery penalty assessed against him. (Smith Decl. ¶ 8; Ex. 3) Thomas E. Seidel did
9 not respond to the Final Notice, Notice of Intent To Levy and Notice of Your Right to a Hearing;
10 he did not make a timely request for a Collection Due Process hearing. (Smith Decl. ¶ 9)

11 Pursuant to the IRS' policy to pursue collection against other sources prior to taking
12 action against a personal residence, on May 29, 2007, Revenue Officer Joe Smith issued six
13 levies with respect to the trust fund recovery penalty to the following entities: (1) Union Bank of
14 California; (2) Marc Goodwin, Inc.; (3) Comerica Bank; (4) Cool Pacific Land Company; (5)
15 Community Bank; and (6) Washington Mutual Bank. (Smith Decl. ¶ 10; Ex. 4) Union Bank of
16 California, Comerica Bank, Cool Pacific Land Company and Community Bank responded
17 negatively. Revenue Officer Smith has not received a response from Washington Mutual Bank
18 or Marc Goodwin, Inc. (Smith Decl. ¶ 11) On June 25, 2007, Revenue Officer Smith issued a
19 new levy to Marc Goodwin, Inc. attaching all compensation for the month of July 2007. The
20 previous levy to Marc Goodwin, Inc. attached all compensation for the month of June 2007.
21 (Smith Decl. ¶ 11)

22 The levies to Marc Goodwin, Inc. attach the salary of Vicki R. Seidel. No exemption was
23 given pursuant to IRC § 6334(a)(9) because the Seidels have other sources of income at least as
24 much as the exempt amount. The Seidels receive rental income from real property located at
25 617, 619, 621, and 623 Sherwood Drive, Salinas, California 93906, which property is held in the
26 name of the nominee Four Rivers Investment, Inc. In addition, Thomas E. Seidel is presently
27 doing business as Seidel Electrical and receiving income from that business. (Smith Decl. ¶¶ 7
28 and 13; Ex. 6)

Revenue Officer Smith issued levies attaching 100 percent of Vicki R. Seidel's salary in payment of Thomas Seidel's tax debt because he understood that California Law allows a creditor to collect a husband's separate debt from both the husband's and wife's interests in community property. (Smith Decl. ¶ 14)

While the ten-year statute of limitations on collection of the trust fund recovery penalty ordinarily would have expired on October 23, 2006, the taxpayer filed an offer in compromise with the IRS on October 19, 2000, which was returned to the taxpayer on April 2, 2003. The pending offer in compromise extended the statute of limitations to January 18, 2008. In addition, the Seidels filed a Chapter 7 bankruptcy on October 25, 1996. A Chapter 7 Discharge of Debtor was filed on February 23, 1997. That bankruptcy extended the statute of limitations an additional 301 days. (Smith Decl. ¶ 15; Exs. 7 and 8)

III. QUESTION PRESENTED

Whether the Internal Revenue Service's actions to collect the trust fund recovery penalty assessed against Thomas E. Seidel should be enjoined.

IV. ARGUMENT

A. Legal Standard Governing Injunctive Relief

Section 7421(a) of the Internal Revenue Code (I.R.C.), commonly known as the Anti-Injunction Act, prohibits any suit "for the purpose of retraining the assessment or collection of any tax . . . by any person." The Supreme Court has recognized that this statute must be given an almost literal effect to accomplish its primary objective of protecting the tax collection process from premature judicial interference pending a suit for refund. *Enochs v. Williams Packing Co.*, 370 U.S. 1, 7-8 (1962); *United States v. American Friends Service Committee*, 419 U.S. 725, 736-37 (1974); *Commissioner v. "Americans United," Inc.*, 416 U.S. 752, 761-62 (1974). In addition, a collateral objective of the Act is to protect the tax collector from tax litigation outside of the statutory scheme provided for by Congress. *Williams Packing*, 370 U.S. at 7-8; *Commissioner v. Shapiro*, 424 U.S. 614, 628 (1976); *Rappaport v. United States*, 583 F.2d 298, 301 (7th Cir. 1979).

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1 An exception to the Anti-Injunction Act is provided in I.R.C. § 7426(b). I.R.C. §
2 7421(a). Section 7426(b) provides that court may grant an injunction to prohibit the enforcement
3 of a levy or to prohibit a sale where the levy or sale would irreparably injure rights in property
4 which the court determines to be superior to the rights of the United States in the property.

5 Section 7426 contains two distinct prerequisites to its application: (1) that the plaintiff
6 have an interest in or lien on the property at issue, and (2) that the levy be wrongful (*i.e.* that the
7 property not be the taxpayer's). The first of these requirements ensure standing; the second
8 focuses on the condition precedent to government seizure, a nexus between the taxpayer and the
9 property. *Flores v. United States*, 551 F.2d 1169, 1171 (9th Cir. 1977).

10 Aside from the statutory exceptions listed in Section 7421(a), the Supreme Court has
11 recognized a limited judicial exception to the prohibition contained in the statute. *Williams*
12 *Packing*, 370 U.S. at 7; *Bob Jones University v. Simon*, 416 U.S. at 736-37. Under this judicial
13 exception plaintiff has the burden of demonstrating that it is clear under no circumstances can the
14 government ultimately prevail and that he will suffer irreparable injury and lacks an adequate
15 remedy at law. *Commissioner v. Shapiro, supra*; *Schildcrout v. McKeever*, 580 F.2d 994 (9th
16 Cir. 1978).

17 The burden of showing entitlement for a preliminary injunction is on the plaintiff. In this
18 circuit, the moving party may meet its burden by demonstrating either (1) a combination of
19 probable success on the merits and the possibility of irreparable injury or (2) that the serious
20 questions are raised and the balance of hardships tips sharply in its favor. *Dr. Seuss Enters. v.*
21 *Penguin Books USA, Inc.*, 109 F.3d 1394, 1397 n.1 (9th Cir. 1997); *Lydo Enterprises, Inc. v. City*
22 *of Las Vegas*, 745 F.2d 1211, 1211 (9th Cir. 1984); *Los Angeless Memorial Coliseum*
23 *Commission v. National Football League*, 634 F.2d 1197, 1201 (9th Cir. 1980). These standards
24 "are not separate tests but the outer reaches of a single continuum." *Intern'l Jensen. Inc. v.*
25 *Metrosound U.S.A.*, 4 F.3d 819, 822 (9th Cir. 1993)(citation omitted). The continuum concept
26 means that if the district court is less certain of the likelihood of success on the merits, "the more
27 plaintiffs must convince the district court that the public interest and balance of hardships tip in
28 their favor." *Southwest Voter Registration Ed. Project v. Shelley*, 344 F.3d 914, 918 (9th Cir.

2003). The court “must balance the competing claims of injury and must consider the effect on each part of the granting or withholding of the requested relief” while giving the public interest in the proceeding “particular regard.” *Amoco Production Co. v. Village of Gambell, Alaska*, 480 U.S. 531 (1987).

B. Plaintiff Cannot Succeed On The Merits Of Her Claims

Plaintiff contends that the levy action taken with respect to her bank account and her salary was wrongful and should be enjoined. She contends that the United States cannot prevail as a matter of law because the levy action was taken without proper notice and without affording the taxpayer a due process hearing pursuant to I.R.C. § 6330. She further contends that because the tax debt is her husband’s, and not hers, that the IRS may not levy may not levy her bank account or her salary. Plaintiff also contends that the ten-year statute of limitations on collection of the trust fund recovery penalty has expired, so the tax debt is no longer collectible.

Plaintiff incorrectly asserts that the levy action was taken without proper notice and without affording the taxpayer a collection due process hearing. The United States’ rights in a taxpayer’s property are governed by the tax lien provisions of the Internal Revenue Code. I.R.C. §§ 6312-6323. Sections 6321 and 6322 provide that a tax lien arises in favor of the United States on the date of assessment and attaches to all property or rights to property belonging to a taxpayer. Section 6323 is a priority granting statute as between a federal tax lien and certain statutorily defined interests of third parties to the taxpayer’s property. Under Section 6331, the United States is authorized to collect delinquent taxes “by levy upon all property and rights to property . . . on which there is a lien . . . for the payment of such tax.” I.R.C. § 6331(a). The taxpayer must be notified in writing of the intention to levy. I.R.C. § 6331(d)(1). On August 24, 2000, the IRS, by certified mail-return receipt, sent Thomas E. Seidel a Final Notice, Notice of Intent To Levy and Notice of Your Right to a Hearing with respect to the trust fund recovery penalty assessed against him. (Smith Decl. ¶ 8; Ex. 3)

As part of the Internal Revenue Service Restructuring and Reform Act of 1998 (RRA 1998), Pub. L. No. 105-206, Sec. 3401, 112 Stat. 685, 746, Congress enacted I.R.C. § 6330 to provide due process protections for taxpayers in tax collection matters. I.R.C. § 6330. The

1 statute provides that prior to the issuance of an administrative tax levy, the IRS must give the
2 taxpayer notice of an opportunity for a CDP hearing before the IRS Office of Appeals. I.R.C. §
3 6330(a), (b). If the taxpayer requests a CDP hearing, he or she is entitled to such a hearing
4 before the IRS Office of Appeals “with respect to the taxable period to which the unpaid tax
5 [listed in the notice] relates.” I.R.C. § 6330(b)(1), (2); Treas. Reg. § 301.6330-1(b), (d). The
6 hearing is to be held before an officer or employee of the IRS who has had no involvement with
7 respect to the taxes at issue prior to the first hearing, but this requirement may be waived by the
8 taxpayer. I.R.C. § 6330(b)(3); Treas. Reg. § 301.6330-1(d). If the taxpayer requests a hearing,
9 any levy actions will be suspended for the period during which the hearing, and appeals therein,
10 are pending. I.R.C. § 6330(e)(1); Treas. Reg. § 301.6330-1(g). A taxpayer must request a CDP
11 hearing within thirty days of the date notice of the right to a hearing is given. I.R.C. §§
12 6330(a)(2) and (a)(3)(B); Treas. Reg. § 301.6330-1(c)(2), A-C3. Thomas E. Seidel was given
13 notice of his right to a Collection Due Process hearing on August 24, 2000. (Smith Decl. ¶ 8; Ex.
14 3). He did not make a timely request for a Collection Due Process hearing. (Smith Decl. ¶ 9)
15 Since the IRS satisfied all procedural prerequisites, it was entitled to levy upon all property and
16 rights to property of Thomas E. Seidel for payment of the trust fund recovery penalty.

17 Plaintiff’s contention that the IRS may not levy upon her bank account or salary to pay
18 her husband’s separate tax debt is incorrect. The trust fund recovery penalty at issue was
19 assessed against Thomas E. Seidel on October 23, 1996. It is his tax debt. However, at the time
20 the debt was incurred, Thomas E. Seidel was married to Vicki R. Seidel. Moreover, at the time
21 they were married, they both resided within the State of California and continue to reside within
22 State of California to this date. Thomas E. And Vicki R. Seidel were married sometime in 1993.
23 Once married, any and all income earned or assets acquired during their marriage constitute
24 community property. Cal. Fam. Code § 760 (West 2004). It is well settled that California
25 community property is liable for either spouse’s separate tax liabilities during marriage. *Babb v.*
26 *Schmidt*, 496 F.2d 957, 959-60 (9th Cir. 1974). In California, the community estate is now liable
27 for a debt incurred by either spouse *before or during* marriage, regardless of which spouse has
28 the management and control of the property and regardless of whether one or both spouses are

parties to the debt or to the judgment for the debt. Cal. Fam. Code § 910(a)(West 2004); *see, e.g., State Bd. of Equalization v. Woo*, 82 C.A.4th 481, 484, 98 C.R.2d 206 (2000)(wife's future earnings were subject to husband's tax debt). A person's earnings during marriage, however, are free of liability for a debt incurred by the person's spouse before marriage. Cal. Fam. Code § 911(a)(West 2004).¹ Thus, the IRS may collect Thomas Seidel's tax debt from the Washington Mutual Bank account held in Vicki R. Seidel's name and from the salary she receives from Marc Goodwin, Inc.²

Plaintiff complains that the IRS failed to allow her the permissible exemptions under I.R.C. § 6334(a)(9). In the case of a taxpayer who has more than one source of wages, salary or other income, the IRS may elect to levy on only one or more sources while leaving other sources of income free from levy. If the wages, salary, or other income that the IRS leaves free from levy equal or exceed the amount to which the taxpayer is entitled as an exemption from levy, the IRS "may treat no amount of the taxpayer's wages, salary, or other income" on which it elects to levy as exempt. Treas. Reg. § 301.6334-2 (c)(1); *see United States v. Ryals*, 480 F.3d 1101, 1110 (11th Cir. 2007); *Melton v. Teachers Ins. & Annuity Association of America*, 114 F.3d 557, 559-60 (5th Cir. 1997). In the present case, Revenue Officer Smith made the determination that the Seidels had other sources of income and, thus, Vicki Seidel's salary was subject to complete levy. (Smith Decl. ¶¶ 7 and 13; Ex. 6)

Finally, plaintiff's contention that the statute of limitations on collection bars the IRS's levy action is without merit. The trust fund recovery penalty was assessed against Thomas E. Seidel on October 23, 1996, and this event triggered the ten-year statute of limitations. I.R.C. §

¹ A tax debt is incurred at the time the obligation arises. Cal. Fam. Code § 903(c)(West 2004) A tax obligation arises when the tax assessment is made. In the present case, the trust fund recovery penalty was assessed on October 23, 1996, during the Seidel's marriage.

² In citing the Internal Revenue Manual for the proposition that the IRS will only collect a separate tax debt from the taxpayer spouse's share of community property, plaintiff omits to inform the court that the section of the IRM immediately following that which was cited by plaintiff provides where state law allows a creditor to collect a separate debt from both spouses' interests in community property, "the husband's separate tax liability would attach to all of the wife's wages . . ." I.R.M. 25.18.4.1(3).

6502(a)(1). Offers in compromise operate as one way to suspend the running of the ten-year statute of limitations. *See* I.R.C. § 6331(k) and (i)(5). In the absence of any offers in compromise or other statutory provisions altering the ten-year period, the statute of limitations on collection of the trust fund recovery penalty would have expired on October 23, 2006. On October 19, 2000, the taxpayer filed an offer in compromise with the IRS, which was returned to the taxpayer on April 2, 2003. (Smith Decl. ¶ 15; Ex. 7) The statute of limitations was extended to January 18, 2008, because of the pendency of the offer in compromise. (Smith Decl. ¶ 15) In addition, the statute of limitations was extended an additional 301 days because the Seidels filed a Chapter 7 bankruptcy on October 25, 1996, for which they received a discharge on February 23, 1997. (Smith Decl. ¶ 15; Ex.8) I.R.C. § 6502(h). Thus, the statute of limitations on collection of the trust fund recovery penalty at issue in this case has not expired.

C. Plaintiff Has Not Established That She Will Be Irreparably Harmed

Plaintiff contends that she will be irreparably injured by the levy on her salary because she will not have funds available to support herself and her children and because it interferes with her employment relationship and professional reputation in the employment community. Mere financial hardship does not cause irreparable injury. *Hughes v. United States*, 953 F.2d 531, 536 (9th Cir. 1992); *Elias v. Connett*, 908 F.2d 521, 526 (9th Cir. 1990)(irreparable harm not established when plaintiff “has failed to show that he will suffer more than mere monetary harm of financial hardship if denied relief”) Moreover, the Seidels have other sources of income. The levy on Vicki Seidel’s salary will not deprive the family of sufficient funds to provide the statutorily prescribed support. (Smith Decl. ¶¶ 7 and 13; Ex. 6)

V. CONCLUSION

For the foregoing reasons, plaintiff has failed to meet her burden by demonstrating either (1) a combination of probable success on the merits and the possibility of irreparable injury or (2) that the serious questions are raised and the balance of hardships tips sharply in her favor. In fact, plaintiff cannot possibly succeed on the merits because the levies in question are not

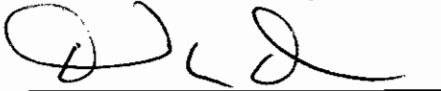
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1 wrongful as a matter of law. The property in question is property in which the taxpayer has an
2 interest.

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4 Respectfully submitted,

5 SCOTT N. SCHOOLS
6 United States Attorney

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8 DAVID L. DENIER
9 Assistant United States Attorney
10 Tax Division
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